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Matrix Churchill and Public Interest Immunity

Gabriele Ganz*

Last year, in the much-publicised *Matrix Churchill* case, three executives of the company were charged with illegally supplying arms-making equipment to Iraq. The case went to trial but the prosecution collapsed after Mr Alan Clark, the former Minister of State for Defence Procurement, admitted in cross-examination that he supported the allegedly unlawful sale.

The *Matrix Churchill* affair is already something of a cause célèbre in legal circles. However, its notoriety does not lie so much in the Minister's surprising admissions under cross-examination, as in the Government's declared position on public interest immunity. Four Ministers[1] having signed public interest immunity certificates in relation to documents pertaining to the case, it was asserted by the Attorney-General[2] (and by other Ministers,[3] including the Prime Minister[4]) that the Ministers had a duty to claim public interest immunity for such documents and that this duty cannot be waived. This assertion, which continues to be made, must be refuted. It is not based on authority (despite the views expressed by two of the defence counsel in a letter to *The Times*[5]) and it goes against the spirit as well as the letter of recent developments in the law of public interest immunity.

In his statement to the House of Commons on 10 November 1992, the Attorney-General said:

> It is the law expressly enunciated by the courts, that Ministers have a duty to claim public interest immunity either in respect of specific documents or recognised classes of document, the production of which would in principle be contrary to the public interest. This duty cannot be waived. Once a proper claim has been made, it is for the court to look at the papers if it thinks fit, to balance the competing public interests and to determine whether the interests of justice in the particular case require disclosure of some or all of the documents in issue. Such a claim must be made irrespective of whether it is embarrassing to the Government either to reveal or to withhold. In this case, it was at the express invitation of prosecuting Counsel that the judge looked at all the material before he made his ruling.

Almost every one of these assertions is questionable.

In a letter to *The Times* on 13 November 1992, the Attorney-General expanded on his statement to the House and paraphrased in support the words of Bingham LJ in *Makanjuola* v *Metropolitan Police Commissioner*[6]:

> Public interest immunity is not a trump card vouchsafed to certain privileged players. It is an exclusionary rule, applying equally to all parties to litigation and irrespective of whether it helps or hinders them, whereby certain classes of documents are immune from production if harm may thereby be done to the operation of the public service.

However, the assertion by Bingham LJ that public interest immunity cannot be waived was made in a totally different context from the *Matrix Churchill* case.

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1 Namely, Mr Kenneth Clarke, Mr Tristan Garel-Jones, Mr Michael Heseltine and Mr Malcolm Rifkind.
2 HC Deb vol 213, col 743 (10 November 1992).
3 HC Deb vol 214, col 640 *seq* (23 November 1992).
4 HC Deb vol 213, col 987 (12 November 1992).
5 *The Times*, 13 November 1992.
6 [1992] 3 All ER 617, 623.

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The documents in issue in *Makanjuola* were witness statements taken for the purpose of investigating a complaint against the police under section 49 of the Police Act 1964. The complainant wanted discovery of these statements in a civil action for assault against the police. Kennedy J ordered disclosure of those statements to which the makers of the statements consented. This was rejected on appeal on the ground that consent could not displace the immunity which would be frustrated if the makers of such statements were liable to be exposed to pressure to consent to disclosure. The issue of whether confidential statements are protected as a class by public interest immunity if this can be waived by those whom it is intended to protect has been a vexed question on which conflicting views have been expressed at the highest level. Thus, Lord Cross in *Alfred Crompton* v *Commissioners of Customs & Excise*[7] thought that waiver was possible if the maker of the confidential statement for which immunity was claimed consented. This dictum was thought to be impossible to reconcile with a statement of Lord Simon in *R* v *Lewes Justices, ex p Home Secretary*,[8] in *Hehir* v *Metropolitan Police Commissioner*.[9] In the latter case, the question of waiver by the maker of a statement was left open by the Court of Appeal. Brightman LJ said:

> It seems to me at least arguable that the public interest would not in all circumstances continue to attach immunity to a statement given for the purposes of s 49 of the Police Act 1964 if the maker of the statement wished disclosure to be made. Perhaps this is not strictly a question of waiver, but of public interest immunity ceasing to attach to a statement if particular circumstances exist.[10]

Makanjuola clearly rejects this approach. However, whether the maker of a statement can set aside the immunity which is intended to protect him is a very different question from whether Ministers have a duty rather than a discretion to claim public interest immunity and whether a refusal to claim such immunity can be categorised as waiver. Lord Pearson in *R* v *Lewes Justices* put it thus:

> The appropriate Minister has the function of deciding, with the assistance of the Attorney-General, whether or not the public interest on the administrative or executive side requires that he should object to the disclosure of the document or information, but a negative decision cannot properly be described as a waiver of privilege.[11]

Lord Pearson's analysis clearly differentiates a Minister's decision in relation to a certificate claiming immunity from the situation in *Makanjuola*. This view is supported by the practice adopted by Ministers, particularly in criminal cases. In the concession to disclose certain documents which the Government announced in 1956,[12] before the courts asserted their authority to decide whether a document must be produced in *Conway* v *Rimmer*,[13] documents relevant to the defence in criminal proceedings were included. Since that case there is a paucity of authority on public interest immunity in the context of criminal cases. This was explained in *R* v *Governor of Brixton Prison, ex p Osman*[14] by Mann LJ:

> Where the interests of justice arise in a criminal case touching and concerning liberty or

7 [1973] 3 WLR 268, 285–286.
8 [1972] 3 WLR 279, 289F. Lord Simon said that public interest immunity could not be waived but this was in the context of documents containing sources of police information.
9 [1982] 1 WLR 715, 722F.
10 At p 723D.
11 [1972] 2 WLR 279, 289C.
12 HL Deb vol 197, col 741 (6 June 1956).
13 [1968] 2 WLR 968.
14 [1991] 1 WLR 281, 288E.

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> conceivably on occasion life, the weight to be attached to the interests of justice is plainly very great indeed. It may be that what I have just said explains the paucity of authority. It may be that prosecutions are not initiated where material is not to be exposed, or it may be that the force of the balance is recognised by prosecuting authorities and the immunity is never claimed.

Whatever the legal position is with regard to public interest immunity being claimed in criminal cases, there are a number of recent examples where public interest immunity has *not* been claimed in such cases. In *M* v *Home Office*,[15] where there was an application to commit the Home Secretary (Mr Baker) for contempt, public interest immunity was not claimed for notes of a meeting between Mr Baker and officials because 'the view was taken in this case that the greater public interest lay in the court having a full account of the facts.'[16] Again, in the prosecution of Mr Ponting for disclosing information about the sinking of the Belgrano, the highly secret document known as the 'Crown Jewels' was admitted in evidence which involved the court having to go 'in camera' and the jury being vetted.[17] When this was put to Mr Heseltine in the debate on Arms Exports to Iraq, he replied that he agreed to make the 'Crown Jewels' available to a Select Committee.[18] Similarly, in the prosecution of Michael Randle and Pat Pottle for helping George Blake to escape from prison, further[19] Special Branch documents were put before the court which had not hitherto been acknowledged and for which no immunity was claimed. These documents helped the prosecution case.[20] There is, therefore, some evidence that documents covered by public interest immunity have been made available in criminal cases, particularly where they help the prosecution. These examples also tarnish the correct assertion that 'such a claim must be made irrespective of whether it is embarrassing to the Government either to reveal or to withhold.'[21]

Most suspect of all is the Attorney-General's description of the procedure involved:

> In fact under the system documents are put before the court by prosecuting counsel. The judge then performs a balancing exercise[22] having, if he considers it appropriate — as he normally would in a criminal case — seen the documents himself.[23]

Mr Heseltine, who was one of the four Ministers[24] who signed public interest immunity certificates, put it even more strongly:

> I would not have acted in the way that I did unless I had been absolutely satisfied that the judge would make available those documents or those parts of a document which he considered necessary for the proper course of justice.[25]

The actual events leading to disclosure by the judge, however, seem to have been at variance with this procedure. It seems that prosecuting counsel had told the judge that the documents contained nothing of assistance to the defence.[26] It was only

15 [1992] 2 WLR 73.
16 At p 89A.
17 Ponting, *The Right to Know* (London: Sphere Books, 1985) pp 166–167.
18 See *supra* n 3, col 648.
19 After the Divisional Court had ordered disclosure of some Special Branch papers.
20 Letter to *The Guardian*, 17 November 1992, from Michael Randle.
21 See *supra* n 2, col 743.
22 'To balance the competing public interests and to determine whether the interests of justice in the particular case require disclosure of some or all of the documents in issue'; see *supra* n 2, col 743.
23 HC Deb vol 214, col 15 (16 November 1992).
24 The others were Mr Rifkind (Defence Secretary), Mr Kenneth Clarke (Home Secretary) and Mr Tristan Garel-Jones (Minister of State, Foreign Office).
25 See *supra* n 3, col 648.
26 *The Guardian*, 10 November 1992, p 2.

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when Geoffrey Robertson QC, counsel for Paul Henderson, against the advice of counsel for the other two defendants,[27] brought out Henderson's links with MI6 that the judge ordered disclosure of documents relating to the security services,[28] having earlier only allowed disclosure of documents relating to policy making within Government departments.[29]

The claim that it is not Ministers but the judge who decides whether documents shall be withheld not only ignores the history of how the courts imposed their decisions on Ministers as late as 1968, but it also distorts the way in which judges exercise this power. It is by no means a foregone conclusion that a judge will second guess a Minister. As we have seen, in this case Judge Brian Smedley QC needed much persuasion before ordering disclosure and Mr Rupert Allason MP suggested he may well have been unique in challenging the certificate.[30] This is clearly an exaggeration, but many examples can be cited where the judges have been reluctant to overrule Ministers. In a similar case to *Matrix Churchill* heard at Reading Crown Court, the judge refused to order disclosure of documents and this led to a plea of guilty and suspended sentences.[31] In *Makanjuola*, on which the Attorney-General placed so much weight, Bingham LJ said that only exceptional circumstances might lead a judge to rule that a document previously immune in the public interest should in the public interest be disclosed.

For Ministers to hide behind the judicial robes, as Richard Shepherd pointed out in the debate on the Matrix Churchill affair, is an abdication of Ministerial responsibility.[32] Ministers are responsible for their decisions, the courts review them and, in this area, only since 1968. The correct way to implement the Government's view of the law would be to enact a Bill on the lines of that introduced by David Winnick MP on 16 November 1992,[33] which would remove the power to claim public interest immunity from Ministers and reserve to the trial judge discretion to decide on the introduction of such documents.

In reality, it is the Government which has the last word, at least when it is a party to the case or where a criminal prosecution is involved. When the court orders disclosure of documents as in the case arising from the death of Blair Peach,[34] in which his mother was suing the police for assault, a settlement for £75,000 damages was considered preferable to the documents being read out in court.[35] In criminal cases, the Attorney-General can always enter a *nolle prosequi* and the shadow Attorney-General asked the Attorney-General whether with hindsight this might not have been the proper course to take in this case.[36] For, ultimately, the most disturbing aspect of the public interest immunity certificates in the *Matrix Churchill* case is that the defendants might have been convicted if the judge had ruled against

27 The letter to *The Times* (*supra* n 5) agreeing with the Attorney-General was written by counsel for one of these defendants.
28 See *supra* n 3, col 689 (Geoffrey Robinson).
29 *The Guardian*, 1 December 1992. The judge (Brian Smedley QC) complained unsuccessfully to the Attorney-General that *The Guardian* was in flagrant breach of his order preventing the jury from hearing pre-trial argument over the certificates because it reported the existence of the certificates before the trial collapsed (*ibid*).
30 See *supra* n 3, col 668. Similar problems were experienced by counsel for Michael Randle and Pat Pottle to obtain disclosure of documents for which immunity was claimed; see Michael Randle's letter to *The Guardian*, 17 November 1992.
31 See *supra* n 3, cols 689 and 691.
32 See *supra* n 3, col 677.
33 HC Deb vol 214, col 165 (16 November 1992).
34 *Peach* v *Metropolitan Police Commissioner* [1986] 2 WLR 1080.
35 *The Guardian*, 8 August 1988.
36 Letter to *The Guardian*, 17 November 1992.

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disclosure. Though Mr Heseltine denied that he was expected to be involved in the conduct of the trial when signing the certificate,[37] both he and Mr Rifkind were at pains to point out that the prosecution was abandoned only because of the evidence of Alan Clark and not because the documents were disclosed.[38] This may be literally true as a matter of timing, but there can be no doubt that the documents disclose highly embarrassing Government complicity in secretly relaxing the guidelines for exports to Iraq.[39] It is the use of public interest immunity to hide this embarrassment which is the worst aspect of the affair. It may be salutary to remember in this context that President Nixon claimed executive privilege when asked to produce the Watergate tapes during the trial of his staff, a claim that was resoundingly rejected by the US Supreme Court.[40] Whether this analogy can be pressed any further depends on the outcome of the inquiry into the Matrix Churchill affair being undertaken by Lord Justice Scott.[41]

Nuisance and Planning

Jenny Steele* and Tim Jewell*

Where a commercial venture has developed pursuant to and within the terms of a permission from the appropriate planning authority, can an action in nuisance be brought which would effectively close it down? This is a simple question, but its importance should not be underestimated.

Gillingham BC v *Medway (Chatham) Dock Co Ltd*[1] was a first instance decision of Buckley J. Its particular facts were unusual and, although leave to appeal was granted planning permission for the operation of a commercial dockyard in part which it raises will therefore have to wait, but those issues are of fundamental importance and are certain to arise again. Beyond the distinction between statutory authority and planning permission, and their relative effects in the law of nuisance, the inescapable question is whether the tort of nuisance can continue to exist alongside other mechanisms for the regulation of land use.

In 1982, the closure of the naval docks at Chatham threatened the local area with economic decline and severe unemployment. In 1983, Gillingham Borough Council granted planning permission for the operation of a commercial dockyard in part of the old port. This commercial venture was no doubt regarded as being in the best interests of the community, and it was accepted that the docks would (and must, if to be commercially viable) operate around the clock.

In 1988, the same Council initiated proceedings in public nuisance against the dock company, apparently in order to protect the interests of residents affected by the noise of heavy goods vehicles going to and from the port between the hours

37 See *supra* n 3, col 649.
38 *ibid* cols 650 and 707.
39 See *The Guardian*, 13 November 1992.
40 *US* v *Nixon* (1974) 418 US 683.
41 See Attorney-General's statement, *supra* n 2.

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1 [1992] 3 WLR 449.

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